U.S. Supreme Court
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 738

LOUIS W. NATHAN, GAETANO ALVITI, FRANK C. TORNABENE, PATRICK J. KNIGHT and JOSEPH A. GIRALAMO,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

Your petitioners, Louis W. Nathan, Gaetano Alviti, Frank C. Tornabene, Patrick J. Knight and Joseph A. Giralamo, respectfully pray that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURTS BELOW.

The judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was entered on January 7, 1956, and is not reported but ap-

pears in the record filed with and certified by the Clerk of the Court of Appeals and transmitted herewith. The record was not printed for use of the Court of Appeals, but was considered on the typewritten stenographic transcript and certified record of the trial Court.

The opinion of the United States Court of Appeals for the Seventh Circuit, affirming said judgment, was filed November 7, 1956, and is reported in 238 F. 2d p. 401, and is included in the Appendix hereto and in the certified copy of the record.

JURISDICTION.

On January 3, 1957, it was ordered that the petition for rehearing be denied. (This order appears in the Appendix herein.) This petition is filed within 30 days of the denial of the petition for rehearing in the United States Court of Appeals for the Seventh Circuit. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1), 62 Stat. 928.

QUESTIONS PRESENTED.

1. Was it not reversible error for the trial Court to refuse petitioners instructions to the effect that in order to be guilty of violating Section 241, Title 18, U. S. Code, the jury must find that the petitioners had the specific intent to injure or oppress a United States citizen or citizens in the enjoyment of a federally guaranteed right? The Court of Appeals held that your petitioners were not entitled to such instructions.

2. Was it not reversible error for the Court of Appeals to hold, as did the trial Court, that the crime of conspiring to violate Section 241 of Title 18, U. S. Code, is not a specific intent crime but is rather a general intent crime?

3. Was it not reversible error for the Court of Appeals to hold that conspiracy is not a specific intent crime?

4. Was it not reversible error for the trial Court, considering the Government's burden of proving your petitioners guilty beyond reasonable doubt, to instruct the jury that it might infer "with a reasonable degree of accuracy" one's intentions from the facts and circumstances divulged by the evidence?

STATEMENT OF THE CASE.

The petitioners were charged in a single count indictment with a violation of Section 241, Title 18, U.S.C., that is to say, of the crime of wilfully and knowingly conspiring to injure and oppress citizens of the United States, legal and qualified voters of the 7th Precinct of the 1st Ward in the City of Chicago, in the free exercise and enjoyment of certain rights and privileges secured to them by the Constitution of the United States, particularly the right of suffrage, that is, the right to cast votes for legally qualified persons for the offices of Representative in the Congress of the United States from the 1st Illinois Congressional District, and for Senator in the Congress of the United States from the State of Illinois, and to have such votes honestly counted, as cast, and recorded and certified at their full value in a general election held November 2, 1954.

The petitioners were found guilty by a verdict of a jury, and from a judgment entered thereon, separate appeals, consolidated in the Court of Appeals for the Seventh Circuit, were taken.

The Government to sustain its burden of proof in the trial Court introduced the testimony of six officials of the Board of Election Commissioners of Cook County,

Illinois, who testified as to the function of the Election Board and identified as Government exhibits the various election paraphernalia and supplies which were used during the conduct of the election.

One of your petitioners, Frank C. Tornabene, was identified as one of the election officials who served in the election in the precinct under the name "Joe Greco". Petitioner, Patrick J. Knight, was identified as an election official serving under the name "Joe Allen", and Petitioner, Joseph A. Giralamo, was identified as an election official serving under the name "Chris Maner." The Government evidence showed that Petitioner, Gaetano Alviti, was present and working about the polling place at various times during the day and Petitioner, Louis W. Nathan, was identified as a party precinct captain of the 7th Precinct of the 1st Ward in the City of Chicago and as having been so for approximately 25 years. Two other defendants, subsequently acquitted by the jury's verdict, were identified as being precinct workers present in and about the polls on the election day. Two additional defendants, a hotel manager and his clerk, who were also named and tried as members of the alleged conspiracy, were also acquitted by the jury's verdict.

Government witnesses, Warren Carlson (Tr. 500) and Peter Engstrom (Tr. 916), testified that as civic watchers assigned to the 7th Precinct of the 1st Ward on the election day in question, they observed various irregularities, such as instances of Board members assisting voters without affidavits of assistance being filed, and identified the members of the precinct Board.

The election returns disclosed that 416 ballots were cast and counted in that general election in the said precinct, of which the Democratic candidate for United States Senator from Illinois received 378 votes and the

Republican candidate for the same office, 36 votes, and of which the Democratic candidate for Representative in Congress from the 1st Illinois Congressional District received 377 votes and the Republican candidate for the same office, 38 votes. The evidence disclosed that 71 of the votes cast were false and fictitious, votes having been cast in the names of registered voters who did not participate in the election and ballots cast in the names of registered voters by persons who falsely represented themselves to be the registered voters. Four witnesses, Alonzo E. Grimes (Tr. 1179), Luther Koone (Tr. 1193), Theresa Magliano (Tr. 1761), and Angelina Magliano (Tr. 1766), registered and qualified voters in the said precinct, testified that they had voted the straight Republican ticket in the said precinct election.

For the sake of brevity we shall confine our statement of the case to the foregoing. The court's attention is invited to the opinion of the Court of Appeals in 238 Fed. 2nd 401 for an additional statement of the government's case.

STATUTE CONCERNED.

Section 241, Title 18, U. S. Code:

"§ 241. Conspiracy Against Rights Of Citizens

"If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

"If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—

"They shall be fined not more than $5,000 or imprisoned not more than ten years, or both. June 25, 1948, c. 645, 62 Stat. 696."

REASONS FOR GRANTING WRIT.

1. The Court of Appeals has decided an important federal question under Section 241, Title 18, U. S. Code, in a way in conflict with applicable decisions of this Court.

2. The Court of Appeals has rendered a decision in conflict with the decisions of at least three other Courts of Appeal.

3. The Court of Appeals has departed far from the accepted and usual course of judicial proceedings and has sanctioned such a departure by the District Court so as to call for an exercise of this Court's power of supervision.

4. We submit not merely that the trial Court and the Court of Appeals erred in questions of law but additionally, that their errors have begotten legal problems of great importance in these times which require review by the highest tribunal of the United States.

We shall address ourselves seriatim to the above numbered reasons. We shall make our presentation as succinctly as possible.

---

1. Reference is made to Questions 1, 2 and 3 of "Questions Presented" in this petition.

That the holding of the Court of Appeals is contrary to the unequivocal holdings of this Court is clear from an examination of the cases.

This Court in *Frohwerk* v. *U. S.* 249 U.S. 204, speaking through Mr. Justice Holmes, said in part:

". . . Intent to accomplish an object cannot be alleged more clearly than by stating that parties conspired to accomplish it."

This Court in *U. S.* v. *Waddell,* 112 U. S. 76 at p. 80, in interpreting the predecessor to the statute concerned, said in part:

"Whenever the acts complained of are of a character to prevent this or throw obstruction in the way of exercising this right, and for the purpose and *with intent to prevent it or to injure or oppress a person because he has exercised it,* then, because it is a right asserted under the law of the United States and granted by that law, those acts come within the purview of the statute and of the constitutional power of Congress to make such statute. (Emphasis supplied.)

This Court in *U. S.* v. *Cruikshank, et al.,* 92 U.S. 542, in considering an indictment under this statute, said that to be guilty of the offense a mere conspiring was insufficient and that the defendants had to conspire with the intent required in order to be guilty of violation. The Court observed, at page 549:

"To bring this case under the operation of the statute, therefore, it must appear that the right, the enjoyment of which the conspirators *intended* to hinder or prevent, was one granted or secured by the constitution or laws of the United States." (Emphasis supplied.)

The holding of the Court of Appeals is contrary to the holding of this Court in *United States* v. *Dennis,* 341 U.S. 494, which case concerned defendants who were convicted of violating the *conspiracy* provisions of the Smith Act. This Court said in part at pages 499 and 500:

"It will be helpful in clarifying the issues to treat next the contention that the trial judge improperly

interpreted the statute by charging that the statute required an unlawful intent before the jury could convict. More specifically, he charged that the jury could not find the petitioners guilty under the indictment unless they found that petitioners had the intent 'to overthrow the government by force and violence as speedily as circumstances permit.'

"Section 2(a) (1) makes it unlawful 'to knowingly or willfully advocate, . . ., or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence . . .' Section 2(a) (3) 'to organize or help to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow . . .' Because of the fact that § 2(a) (2) expressly requires a specific intent to overthrow the Government, and because of the absence of precise language in the foregoing subsections, it is claimed that Congress deliberately omitted any such requirement. We do not agree. It would require a far greater indication of congressional desire that intent not be made an element of the crime than the use of the disjunctive 'knowingly *or* wilfully' in § 2(a) (1), or the omission of exact language in § 2(a) (3). The structure and purpose of the statute demand the inclusion of intent as an element of the crime. Congress was concerned with those who advocate and organize for the overthrow of the Government. Certainly those who recruit and combine for the purpose of advocating overthrow intend to bring about that overthrow. We hold that the statute requires as an essential element of the crime proof of the intent of those who are charged with its violation to overthrow the Government by force and violence. See *Williams* v. *United States*, 341 U.S. 97, 101, 102, *ante*, 774, 778, 779, 71 S. Ct. 576 (1951); *Screws* v. *United States*, 325 U.S. 91, 101-105, 89 L. Ed. 1495; 1502-1505, 65 S. Ct. 1031, 162 ALR 1330 (1945); *Cramer* v. *United States*, 325 U.S. 1, 31, 89 L. Ed. 1441, 1459, 65 S. Ct. 918 (1945).

"Nor does the fact that there must be an investigation of a state of mind under this interpretation afford any basis for rejection of that meaning. A survey of Title 18 of the U.S. Code indicates that the vast majority of the crimes designated by that Title require, by express language, proof of the existence of a certain mental state, in words such as 'knowingly,' 'maliciously,' 'wilfully,' 'with the purpose of,' 'with intent to,' or combinations or permutations of these and synonymous terms. The existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence. See *American Communications Asso.* v. *Douds*, 339 U.S. 382, 411, 94 L. Ed. 925, 950, 70 S. Ct. 674 (1950).

"It has been suggested that the presence of intent makes a difference in the law when an 'act otherwise excusable or carrying minor penalties' is accompanied by such an evil intent. Yet the existence of such an intent made the killing condemned in *Screws*, 325 U.S. 91, 89 L. Ed. 1495, 65 S. Ct. 1031, 1662 ALR 1330, *supra*, and the beating in *Williams*, 341 U.S. 97, *ante*, 774, 71 S. Ct. 576, *supra*, both clearly and severely punishable under state law, offenses constitutionally punishable by the Federal Government. *In those cases, the Court required the Government to prove that the defendants intended to deprive the victim of a constitutional right.* If that precise mental state may be an essential element of a crime, surely an intent to overthrow the Government of the United States by advocacy thereof is equally susceptible of proof." (Emphasis supplied.)

It is submitted respectfully that the foregoing illustrates that the opinion of the Court of Appeals is in direct conflict with applicable decisions of this Court.

The Court of Appeals acknowledged in its opinion (238 F. 2d 401 at 404) that this Court has agreed with our thesis but the Court of Appeals mistakenly, as we point

out at page 3 of our petition for rehearing, which has been made a part of this record, held that this Court changed its position relative to the required intention under this statute. We challenge the Government to demonstrate to this Court wherein this Court in the cases cited by the Court of Appeals on page 404 of its opinion stated: (a) that in order to violate Section 241 of Title 18 it is not necessary to have the specific intent described in the statute; (b) that defendants in a prosecution under this statute are not entitled to instructions relative to the specific intent we have described; and (c) that conspiracy is not a specific intent crime. This Court's holding in *U. S.* v. *Dennis,* cited *supra,* unmistakably demonstrates that this Court has not changed its decisions in the cases we have offered.

2. Reference is made to Questions 1, 2 and 3 of "Questions Presented" in this petition. The decision of the Court of Appeals is in direct and glaring conflict with the decisions of other Courts of Appeal on the same matter. The defendants in *McDonald* v. *U. S.,* 9 F. 2d 506 (8th Cir.), were charged with having conspired to injure and oppress one Akard in the enjoyment of his right to exercise the office of postmaster. It appeared that the defendants attacked Akard and drove him from the community. There was evidence that the defendants assaulted Akard because of an alleged assault by him on a girl. The Court instructed the jury in part that a person is presumed to intend the natural and probable consequences of his acts. (This is the position of the Court of Appeals herein. 238 F. 2d 401 at 404.) The Court of Appeals held that the instruction constituted reversible error. The Court said in part:

> "The statute here involved sets forth and requires *a specific intent; that intent is a substantial element of the crime and must be proven.*" (Emphasis supplied.)

The Court of Appeals in *Janes* v. *U. S.*, 6 F. 2d 545 (8th Cir.), considered a matter in which the defendants had been convicted of conspiring to injure, oppress and intimidate one Price in the free exercise and enjoyment of his rights as a homesteader on public land. The Court of Appeals in reversing the conviction relied in part on the holding of this Court in *United States* v. *Waddell*, 112 U.S. 76. The Court said in part:

> "*This offense of interfering with an entryman is made up of a criminal intention to interfere with the exercise of his rights as such and of acts done in execution of that intention* . . . The mere fact that these sheep were attacked and Durnell killed on public land five miles from the homestead would not prevent such acts from being criminal and an interference with Price's rights as an entryman, if they were perpetrated with the *requisite criminal intention to so interfere.* On the other hand, a personal assault upon Price in his house on the homestead would not constitute such interference if the motive thereof had no connection with his rights as an entryman. *The criminal intention required to be present as a necessary element in the unlawful interference with an entryman is an intention to interfere with his exercise of the rights of an entryman.* The rule is laid down by the Supreme Court in *United States* v. *Waddell*, 112 U.S. 76, 80, 5 S. Ct. 35, 37, 28 L. Ed. 673, where, in discussing this statute (Criminal Code, Par. 19 (Comp St. Par. 10183)), the court says: 'Whenever the acts complained of are of a character to prevent this, or throw obstruction in the way of exercising this right and for the purpose and with intent to prevent it, or to injure or oppress a person because he has exercised it, then, because it is a right asserted under the law of the United States and granted by that law, those acts come within the purview of the statute and of the constitutional power of Congress to make such statute.''

. . . "In our judgment, the evidence fails to show any intent in any of these defendants to interfere with Price in the exercise of any of his rights as an entryman. The right to graze sheep on the public domain is not peculiar to a homestead entryman but is open to all. An interference with such right is not at all necessarily connected with the rights of any entryman in any way. It is entirely possible to interfere with such grazing right without intending any interference with the rights of an entryman as such, or even without having such rights in mind."

. . .

"In short, all of the evidence (for the prosecution as well as for the defense) is convincing that the sole motive in the attack and killing was to prevent sheep grazing on cattle range. The ownership of the sheep had not the slightest thing to do with the matter." (Emphasis supplied.)

U. S. v. *Kantor, et al.*, 78 F. 2d 710, concerned appellants who had been convicted of conspiring to injure, oppress, etc. citizens in the exercise of their civil rights of voting. (Your petitioners were similarly charged.) The Government's case showed that the appellants forged signatures of voters, interfered with voters, that voting machines improperly rang up votes, and that the defendants turned the voting machines in improper positions in the polling place. The Court of Appeals for the Second Circuit unanimously reversed the conviction. The Court said, at page 712:

"It is not every wrongful act, which alters the result of the election, which is distinguishable under this section of the statute. It must be some act *intended to prevent some citizen from exercising his constitutional rights.* (Citations omitted.)" (Emphasis supplied.)

The Court of Appeals in *Buchanan* v. *U. S.*, 233 F. 257, said with respect to the statute concerned:

> *"Intent in respect of the Federal right is an essential element of the offense charged."* (Emphasis supplied.)

We submit to this Court that there was absolutely no evidence that the defendants conspired (which embraces the concept of specific intention) to deprive citizens of federally protected rights. Rather, assuming gratuitously and for purposes of argument solely, that they committed the acts, the Government's case, if believed, tended to show that they acted for purposes of political preferment and monetary profit. The Court of Appeals in its opinion (238 F. 2d 401 at 404) candidly acknowledges this.

3. Reference is made to Questions 3 and 4 of "QUESTIONS PRESENTED" in this petition.

(a) We submit most respectfully that the Court of Appeals erred seriously in holding that conspiracy is not a specific intent crime. We submit that of *necessity* it is a specific intent crime. *When persons agree to commit a crime, logic compels the conclusion that they intend to commit the crime!* The indictment concerned charged that the defendants wilfully and knowingly conspired, *i.e., agreed and intended,* to injure certain citizens of the United States in the free exercise and enjoyment of certain rights and privileges secured to them by federal law. It was mandatory that the Government establish that the defendants had such an intention. An intention merely to cast false ballots could not suffice. It is apparent from this that the defendants were entitled to instructions concerning the specific intent which must have been demonstrated to establish a violation of the statute.

These instructions denied are identified as Steinberg and Salvatori Instructions 16 and 17. Such instructions

were adopted by the petitioners Nathan and Alviti (Tr. 3086) and by the petitioners Knight, Frank Tornabene and Giralamo (Tr. 3088), and have been made a part of this record on appeal in this court. They appear in the Appendix to this petition.

Pursuing our argument that conspiracy is a specific intent crime, we respectfully invite the attention of this Court to the article entitled "Intent in Criminal Conspiracy" appearing in 89 *University of Pennsylvania Law Review* 624. The author of the article is Dean Albert Harno of the University of Illinois School of Law, who is recognized to be one of the leading criminal law authorities in the United States. The following are quotations excerpted more or less at random from the article:

> "The evidence must establish that there was unity of intent on the part of two or more persons to accomplish the end charged . . . The crime of conspiracy, as we have observed, is heavily mental in composition . . . In conspiracy the stress is on the intent element . . . So it is with criminal conspiracy. Criminal conspiracy involves a *specific intent* to commit a particular act, the perpetration of which the state desires to forestall. As a problem in procedure, to establish a criminal conspiracy the state must prove an agreement on the part of two or more persons, and it must prove that the common intent flowing from that agreement was *specific* and was criminal . . . *That criminal conspiracy must involve a specific intent becomes apparent when the essential attributes of the crime are analyzed . . . That a specific intent must be proved is clear* . . . We shall proceed with this study on the assumption that we are dealing with a crime in which the intent element is the gist; *that that intent is specific,* and that the decisions, though not all of them, can be rationalized on that assumption . . . When a specific intent 'is a requisite element of the offense, and such intent is nega-

> tived by ignorance or mistake, it is held that the defendant shall not be convicted . . .' " (Emphasis supplied.)

The holding of the Court of Appeals that conspiracy is not a specific intent crime establishes a dangerous precedent. This Court in many cases as pointed out the perils to the innocent inherent in conspiracy prosecutions. This Court's attention is also invited to the Recommendations of the Senior Circuit Judges, Reports of the Attorney General, 5-6 (1925). Judge Learned Hand in *Harrison* v. *U.S.*, 7 F. 2d 259 at 263, described conspiracy as the "darling of the modern prosecutor's nursery." In *U. S.* v. *Falcone*, 109 F. 2d 579 at 581, Judge Hand declared,

> ". . . so many prosecutors seek to sweep within the dragnet of conspiracy all those who have been associated in any degree whatever with the main offenders. That there are opportunities of great oppression in such a doctrine is very plain, and it is only by circumscribing the scope of all such comprehensive indictments that they can be avoided."

Dean Albert J. Harno, of the Law School of the University of Illinois, in 89 *University of Pennsylvania Law Review* 624 at 646, noted:

> "But it (conspiracy) also is a branch of jurisprudence which, as Fitzgerald, J., has observed, is to 'be narrowly watched, to be jealously regarded, and never to be pressed beyond its true limits.'
>
> "Owing to the elasticity of the crime and its vague boundaries, there can be no doubt that it presents serious potential dangers of abuse."

Also see "The Conspiracy Dilemma: Prosecution of Group Crime or Protection of Individual Defendants." 62 *Harvard Law Review* 276.

We submit with great earnestness that the Court of Appeals has far departed from the accepted and usual course of judicial proceedings and has sanctioned such a departure by the U. S. District Court. Concern for those who hitherto will be named as defendants in indictments for conspiracy calls for an exercise by this Court of its power of supervision.

(b) The trial Court in discussing intent instructed the jury in substance that while they could not look into a person's mind and see what his intention was, a careful consideration of the circumstances shown by the evidence in any case enables one to infer with "a reasonable degree of accuracy" what another's intentions were in doing or not doing certain things (Tr. 3045, 3046). The jury thus was instructed in effect that, if they believed the defendants guilty within "a reasonable degree of accuracy," they should find for the Government. This clearly was violative of the great edict of our law that a defendant must be found guilty *beyond a reasonable doubt.* Fortunately, in the United States it is not the law that persons charged with crime will be convicted if their guilt appears with "a reasonable degree of accuracy!"

The Court of Appeals for the Third Circuit in *U. S.* v. *Crescent-Kelvan Co., et al.,* 164 F. 2d 582, met with the following situation: The trial Court through inadvertency said that the guilt of the defendants was to be proven by a preponderance of the evidence. The defendants' counsel requested a correction and the trial Court then correctly instructed the jury as to reasonable doubt. At the suggestion of the United States Attorney the trial Court further instructed the jury as to reasonable doubt and then parenthetically added,

> "Does that answer your question?—That is, the preponderance of the evidence."

The Court of Appeals held that this was error, saying that the jury may well have been misled. The Court added,

> "The defendants in a criminal case are entitled to a clear and unequivocal charge by the Court that the guilt of the defendants must be proved beyond a reasonable doubt."

How can it be said here that the jury was not misled?

The Court of Appeals in its opinion (238 F. 2d 401 at 408) acknowledged that the phrase we complain of, that is, "reasonable degree of accuracy," was erroneous. However, the Court opined that the fact that the trial Court had elsewhere in his charge to the jury correctly instructed as to reasonable doubt removed the error. We submit that this is unrealistic. If the trial Court had instructed the jury correctly ten times concerning the presumption of innocence in a criminal case and once have instructed the jury that a defendant is presumed to be guilty, would lawyers and judges of trial and appellate experience blandly say that the error was corrected because the jury had been instructed correctly more often than it had been misinstructed?

We submit that the action of the Court of Appeals departs from the accepted and usual and *necessary* course of judicial proceedings and this Court should exercise its power of supervision.

4. The questions presented by your petitioners are patently of great and far-reaching importance.

The predecessor statutes to Section 241 of Title 18, U. S. Code, originated in the troubled years following the Civil War. The problems which existed then, which motivated the Congress to enact the statutes, unfortunately persist today. We might observe that the decision of this Court relative to segregated education has brought the

intent question with respect to Section 241 into sharper focus. Regretfully, we opine that there must be in certain areas of the United States prosecutions brought under this statute with respect to educational segregation, jury service, voting rights and similar questions. We urge that this Court grant review herein so that lower federal courts, the United States Department of Justice, including United States Attorneys and the Federal Bureau of Investigation, and members of the Bar will know what intention must be demonstrated in order to prove a violation of Section 241, Title 18, U. S. Code.

May we argue that the Court of Appeals' holding that conspiracy is not a specific intent crime is dangerous and (not to be dramatic) imperils the security of our citizens. It is axiomatic that conspiracies are usually established by circumstantial evidence. The holding of the Court of Appeals that a conspiracy may be shown by invoking the rule that men are assumed to have intended the natural and probable consequences of their conduct is a new point to which the always potentially dangerous doctrine of conspiracy has been carried.

We argue to this Court, without immodesty, that the Court of Appeals appreciated that grave, disturbing and far-reaching problems were concerned in our appeals. To offer evidence which we believe illustrates this, may we point out that we filed our petition for rehearing on November 27, 1956, and the Court held such petition under consideration until January 3, 1957, on which date it denied our petition for rehearing without rendering an opinion! The original decision of the Court of Appeals was unanimous. However, the learned Chief Judge of the Court of Appeals later voted to allow our petition for rehearing (see Appendix p. 15a).

CONCLUSION.

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

RICHARD E. GORMAN,
DANIEL P. WARD,
Attorneys for Petitioners.

APPENDIX.

IN THE

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Nos. 11665-6 September Term and Session, 1956

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
LOUIS W. NATHAN, GAETANO ALVITI, FRANK C. TORNABENE, PATRICK J. KNIGHT and JOSEPH A. GIRALAMO,
Defendants-Appellants.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

November 7, 1956

Before DUFFY, *Chief Judge,* MAJOR and LINDLEY, *Circuit Judges.*

MAJOR, *Circuit Judge.* Defendants named in the caption, and others, were charged in a single count indictment with a violation of Sec. 241, Title 28 U.S.C., that is to say, of the crime of wilfully and knowingly conspiring to injure and oppress citizens of the United States, legal and qualified voters of the 7th Precinct of the 1st Ward in the City of Chicago, in the free exercise and enjoyment of certain rights and privileges secured to them by the Constitution of the United States, particularly the right of suffrage, that is, the right to cast a vote for legally qualified persons for the offices of Representative in Congress of the United States from the First Illinois Con-

gressional District, and for Senator in the Congress of the United States from the State of Illinois, and to have such votes honestly counted, as cast, and recorded and certified at their full value in a general election held on November 2, 1954.

Defendants were found guilty by verdict of a jury, and from a judgment entered thereon separate appeals, consolidated in this court, have been taken. Other defendants named in the indictment, Anthony Salvatori, Morton Steinberg, James Gabler and Louis Tornabene, were acquitted by the jury. Another named defendant, Eugene Jerome Laurie, entered a plea of guilty during the course of the trial.

The contested issues as stated and argued by the defendants are: (1) Did the government prove beyond reasonable doubt that the defendants had the intention of injuring and oppressing United States citizens in Federally secured rights? (2) Did the court err in admitting certain evidence against the defendants, such as testimony concerning statements by alleged co-conspirators after the termination of the alleged conspiracy? (3) Was the evidence presented sufficient to prove the defendants conspired as charged? and (4) Did the court err in instructing the jury and in failing to instruct the jury as requested?

In the view which we take of the case and for the reasons subsequently stated, we think it unnecessary to make a detailed recital of the proof upon which the government relies. A general election took place on November 2, 1954, and the rear portion of the lobby of the New Loyal Hotel at 656 South State Street in Chicago was used as the polling place for the 7th Precinct of the 1st Ward. Five men served as Judges and Clerks in said Precinct and election, as follows: Guy Alvin, as Clerk, who has never been apprehended; Eugene Jerome Laurie, as Judge, under the alias of Tony Genero, who pleaded guilty as charged during the course of the trial; Frank Cleo Tornabene, as Judge, under the alias of Joe Greco; Patrick Joseph Knight, as Clerk, under the alias of Joe Allen,

and Joseph Anthony Giralamo, as Judge, under the alias of Chris (Chis) Maner. Thus, of the defendants now before this court, Tornabene, Knight and Giralamo served as election officials. Defendant Nathan, the owner and operator of a club located at 606 South Wabash Avenue in Chicago, was a party precinct captain of the 7th Precinct of the 1st Ward in the City of Chicago, and had been for approximately 25 years. Defendant Alviti was manager of the club owned by Nathan, where he had been employed for some 18 years. His duties on the day in question were to assist the precinct captain. The election was conducted under the jurisdiction of the Board of Election Commissioners of Cook County. All the Judges and Clerks applied for appointment under alias names, were appointed and served under such names and received checks from the County Comptroller for services rendered as election officials in said Precinct, all made payable to said alias names.

The election returns disclosed that 416 ballots were cast and counted in that general election in said Precinct, of which the Democratic candidate for United States Senator from Illinois received 378 votes, and the Republican candidate for the same office, 36 votes, and of which the Democratic candidate for Representative in Congress from the First Illinois Congressional District received 377 votes, and the Republican candidate for the same office, 38 votes. Four witnesses, registered and qualified voters in said Precinct, testified that they had voted the straight Republican ticket in said Precinct and election.

Of the votes thus cast no fewer than 71 were false and fictitious. We do not understand that defendants dispute that such false and fictitious ballots were cast and counted; at any rate, the government's proof on that score is abundant. No purpose could be served, therefore, in relating the manner and means employed to produce that result. In the main they represent votes cast in the names of registered voters who for one reason or another did not participate in the election. Ballots were cast in the names of such registered voters by persons

who falsely represented themselves to be the registered voters. In some instances two or three ballots were cast in the name of a single non-participating registered voter. A few ballots were cast in names of persons not registered as voters. Some ballots were cast in the false and fictitious names under which certain of the Judges and Clerks served as election officials.

We have said we find it unnecessary to make a detailed statement of the government's proof. This is particularly so as it relates to the charge of conspiracy. A study of the record leads us to the firm conviction that the proof, without room for controversy, shows a conspiracy, the object and purpose of which was to cast and cause to be cast false and fictitious ballots. It may be true that the proof connecting some of the defendants with the conspiracy is rather weak but, even so, it was sufficient to take the case to the jury on that issue. Furthermore, the proof is conclusive that the objective of the conspiracy was accomplished and that as a result there was a pollution of the ballot box in this Precinct.

Of the numerous questions argued here, the most important arises from defendants' contention that it was incumbent upon the government to prove that the defendants, pursuant to the conspiracy alleged, had the specific intent of injuring or oppressing a citizen in the enjoyment of a Federally secured right. A number of instructions offered on this theory were rejected by the trial court. Typical of such refused instructions is one which reads as follows:

> "Unless you find, beyond a reasonable doubt, that the defendants conspired, combined, confederated and agreed together with the specific and willful intent to injure and oppress a citizen of the United States in the exercise of a right guaranteed or secured by the Constitution or laws of the United States, and did so knowingly, it is your duty to acquit the defendants, or such defendant or defendants who did not knowingly, and with such specific and willful intent so conspire, combine, confederate and agree."

The theory embodied in the court's given instructions was that a general intent was sufficient. The government here defends that theory. In its brief it states:

> "The Government contends that the intent needed to support a conviction under Section 241 is the same intent which is required, as a general rule, by most criminal statutes and which was described by Mr. Justice Holmes in *Ellis* v. *United States*, 206 U.S. 246 (1906), at 257: 'If a man intentionally adopts certain conduct in certain circumstances known to him, and the conduct is forbidden by the law under those circumstances, he intentionally breaks the law in the only sense in which the law ever considers intent.'"

The government also relies upon *United States* v. *Lightfoot*, 228 F. 2d 861, 866, a recent decision of this court, wherein it is stated:

> "The law assumes every man to intend the natural consequences which one standing in his circumstances and possessing his knowledge would reasonably expect to result from his acts."

The contention under discussion, of course, assumes that a conspiracy was shown, the purpose of which was to cast and cause to be cast false and fictitious ballots. We think it can be plausibly argued, as defendants do, that there was no intention or purpose on the part of defendants to injure and oppress citizens of the Precinct in the enjoyment of their constitutional rights. Certainly it is just as reasonable and perhaps more so to believe that their purpose and objective was something different. In fact, we think it more likely, as defendants point out, that the engagement by the defendants in their nefarious conduct had as its objective the making of a good showing in the Precinct for the political party in which they were interested so as to win the acclaim of those higher up in the political hierarchy, with such reward and preferment as might be reasonably expected to flow therefrom.

This contention that the burden was upon the government to prove a specific intent or, at any rate, that defendants were entitled to have the issue submitted to the jury under proper instructions, is not without merit and finds some support in the cases. *Buchanan* v. *United States,* 233 F. 257; *James* v. *United States,* 6 F. 2d 545; *McDonald* v. *United States,* 9 F. 2d 506; *Britton et al.* v. *United States,* 60 F. 2d 772; *United States* v. *Cruikshank et al.,* 92 U.S. 542; *Frohwerk* v. *United States,* 249 U.S. 204.

However, the support which these and other cases afford defendants' contention has, in our judgment, been dissipated by later decisions of the Supreme Court. See *United States* v. *Mosley,* 238 U.S. 383; *United States* v. *Classic et al.,* 313 U.S. 299; *United States* v. *Saylor et al.,* 322 U.S. 385; *Screws et al.* v. *United States,* 325 U.S. 91, and *United States* v. *Williams et al.,* 341 U.S. 70.

Defendants in the trial court cited the *Screws* and *Williams* cases in support of their proffered instructions on the issue of specific intent. The trial court evidently thought their reliance upon these cases was misplaced. Now, in this court, the government relies upon these same cases in support of its position.

The apparent confusion in these decisions of the Supreme Court may be attributable, we think, to the sharp division which existed among members of the court and a failure to give proper recognition to the distinction which the court has made between violations of Sec. 241 and Sec. 242.

Sec. 241 (formerly Sec. 19 of the Criminal Code, which originated as Sec. 6 of the Act of May 31, 1870), charged to have been violated in the instant case, is a conspiracy statute and provides:

> "If two or more persons conspire to injure, oppress * * * any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States * * *" (then follows the prescribed penalty).

Sec. 242 (formerly Sec. 20 of the Criminal Code, which originated as Sec. 2 of the Civil Rights Act of 1866) provides:

> "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State * * * to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States * * *" (then follows the prescribed penalty).

Any discussion of the Supreme Court decisions involving these two sections of the Civil Rights Act may well commence with the *Classic* case (313 U.S. 299), not only because of what was said in that case but because of the appraisement given to it by the Supreme Court in subsequent decisions. There, the question for decision was whether the right of qualified voters to vote in the Louisiana primary and to have their ballots counted was a right "secured by the Constitution" within the meaning of Sec. 19 (now 241) and Sec. 20 (now 242) of the Criminal Code, and whether the acts of the defendants as alleged in the indictment violated those sections. The court answered the questions in the affirmative, with three Justices dissenting. There, the defendants as election officials were charged with altering ballots, counting them for candidates other than for whom they were cast, and making false certification of the number of votes cast for the different candidates. The court (page 315) cites numerous decisions in support of its holding that the right of qualified voters to cast their ballots and have them counted at Congressional elections is a right secured by the Constitution. The court held that Sec. 20, as well as Sec. 19, was applicable on the premise that both sections protected rights which stemmed directly from the Constitution. At the same time, the court refused to discuss the application of Sec. 20 to deprivation of rights guaranteed by the Fourteenth Amendment because the question had not been raised and discussed in the court below.

The *Screws* case (325 U.S. 91) in which defendants here profess, mistakenly we think, to find support for

their specific intent contention, is another of these civil rights cases in which the court was sharply divided. Four of the members embraced what is designated as the majority opinion, one member concurred in the result but upon reasoning different from that utilized by the so-called majority, and four members dissented. In this case the court reversed a judgment, with directions for a new trial, wherein defendants, local law-enforcement officers, were charged with arresting a Negro citizen for a State offense and wrongfully beating him to death. The prosecution was based upon a violation of Sec. 20 (now 242) concerning a right which did not stem directly from the Federal Constitution but which was a deprivation of due process as guaranteed by the Fourteenth Amendment. Sec. 20 was subjected to attack as being unconstitutional on the grounds that it provided no ascertainable standard of guilt when applied to Fourteenth Amendment rights. The reasoning on this score was that due process rights are of such a variable nature that there is no way of knowing in advance which rights are included within its broad scope. The court, in order to preserve the constitutionality of Sec. 242, held that the word "willful" included in that section (not included in Sec. 241) should be construed as applying to an act committed with the specific intent to deprive a citizen of a due process right. This construction, so the court held, avoided "those consequences to the accused which may otherwise render a vague or indefinite statute invalid." The court stated (page 105):

> "* * * the only other alternative, if we are to avoid grave constitutional questions, is to construe it as applicable only to those acts which are clearly marked by the specific provisions of the Constitution as deprivations of constitutional rights, privileges, or immunities, and which are knowingly done within the rule of Ellis *v.* United States, supra. [206 U.S. 246.] But as we have said, that course would mean that all protection for violations of due process of law would drop out of the Act."

The judgment in *Screws* was thus reversed because of the failure to instruct the jury that a specific intent was required. It therefore appears plain that the reasoning of the court was limited expressly to due process rights predicated on the Fourteenth Amendment and that it has no application to rights specifically guaranteed by the Constitution, such as those in the instant case. Mr. Justice Rutledge in a concurring opinion reasoned that Secs. 19 and 20 are twin sections in all respects that concern any question of vagueness, that they each guard the same basic rights and that they must stand or fall together. Unfortunately, however, for the defendants his reasoning, logical as it may appear, was not that of the court.

Another important observation relative to the opinion of the majority in the *Screws* case is the appraisement which it made of its decision in the *Classic* case. Referring to this latter case, the majority stated (page 106):

> "The indictment was sufficient since it charged a willful failure and refusal of the defendant election officials to count the votes cast, by their alteration of the ballots and by their false certification of the number of votes cast for the respective candidates. 313 U.S. pp. 308-309. The right so to vote is guaranteed by Art. I, Sec. 2 and Sec. 4 of the Constitution. Such a charge is adequate since he who alters ballots or without legal justification destroys them would be acting willfully in the sense in which Sec. 20 uses the term. The fact that the defendants may not have been thinking in constitutional terms is not material where their aim was not to enforce local law but to deprive a citizen of a right and that right was protected by the Constitution. When they so act they at least act in reckless disregard of constitutional prohibitions or guarantees."

United States v. *Williams et al.*, 341 U.S. 70, is another case where the court was sharply divided. Four members embraced what is known as the majority opinion, one member concurred in the result on an entirely different

basis and four members dissented. In this case the majority affirmed the Court of Appeals for the Fifth Circuit, which had reversed a conviction on a conspiracy indictment based on Sec. 241. It was there charged that a citizen was injured in rights and privileges secured and protected by the Fourteenth Amendment. *The majority held that such* rights were protected by Sec. 242 but not by Sec. 241. *We find nothing in the majority opinion of any benefit to either of the parties in the instant case on the issue under discussion.* True, the dissenting opinion approves the concurring opinion of Mr. Justice Rutledge in the *Screws* case, that Secs. 241 and 242 are companion sections, with no substantial difference in the basic rights protected, and that they were both in the same category on the matter of vagueness. The dissenting opinion (page 94) sets forth the instructions which were given by the trial court in that case, which followed the rule in the *Screws* case in order to avoid any claim of unconstitutionality of Sec. 19 on the ground of vagueness. The reasoning appears to be that any uncertainty arising from the fact that Fourteenth Amendment rights were alleged in an indictment based upon Sec. 241 becomes immaterial in view of the fact that the burden was imposed upon the government by the instructions to the jury to prove a specific intent. There is no comfort for defendants in the instant case, however, in this dissenting opinion. Aside from the fact that it does not represent the opinion of the court, it is plain that the dissenting opinion stands only for the requirement of specific intent in a case involving due process rights. In fact, the cleavage between the two segments of the court was due to the reasoning of the majority that a violation of due process rights could be prosecuted only under Sec. 242, while the dissenting members reasoned they could be prosecuted under either section, providing, as we understand, that a jury was required to find a specific intent on the part of the defendant to violate such rights.

Another case worthy of mention is *United States* v. *Saylor et al.*, 322 U.S. 385. In that case, as here, defendants were charged with acts which amounted to a pollution of the ballot box. The indictment in that case was

predicated upon Sec. 19 of the Criminal Code (now 241) and in all material respects was the same as the indictment in the instant case. The Supreme Court reversed a District Court which had held the indictment defective as failing to state a crime against the United States. The Court in its discussion made the following pertinent observation (page 389):

> "For election officers knowingly to prepare false ballots, place them in the box, and return them, is certainly to prevent an honest count by the return board of the votes lawfully cast. The mathematical result may not be the same as would ensue throwing out or frustrating the count of votes lawfully cast. But the action pursuant to the conspiracy here charged constitutes the rendering of a return which, to some extent, falsifies the count of votes legally cast."

It is our view and we so hold that the court properly rejected the contention that the burden was upon the government to prove that the defendants had the specific intent to injure and oppress a citizen in a right secured by the Constitution. The cases, so we think, require that result. A contrary holding would cast Sec. 241 to the ash heap. Specific intent could be had only by those with knowledge of the rights conferred upon the citizen by the Constitution. It must be remembered in the instant situation that injury to the citizens followed inevitably from the nefarious conduct of the defendants. Those who participated in such conduct assumed all the hazards incident thereto, including injury to the citizen which was certain to flow therefrom. And it is immaterial that the defendants were without knowledge of the constitutional rights of citizens. When they acted in concert to pollute the ballot box they acted in reckless disregard of such rights and must be held to the consequences. (See quotation from *Screws* case, supra.)

Defendants also rely upon a number of other errors alleged to have been committed by the court in its charge

to the jury. The court, in referring to a certain government witness, stated that he "testified for the purpose of showing bad character, for it is not the man that he is but the name that he has which has been put in issue." Defendants argue that they were seriously prejudiced by the court's characterization of "bad character" when it should have been "bad reputation." We think this point is of little or no consequence. *Knode* v. *Williamson,* 84 U.S. 586, 588. The court, after explaining to the jury the difference between direct and circumstantial evidence and that either or both could be relied upon for a conviction providing the guilt of the defendants was shown beyond a reasonable doubt, stated, "Generally direct proof of a criminal conspiracy is not available and it will be disclosed only by a development and collaction of circumstances." The phrase, "development and collaction of circumstances," has been employed in court opinions. *United States* v. *Manton,* 107 F. 2d 834, 839, and *Glasser* v. *United States,* 315 U.S. 60, 80. It does not follow, however, that it is a proper phrase to be employed in an instruction. But whether so or not, it is not discernible how it could have been prejudicial.

Defendants complain of an instruction the substance of which is stated in their brief as follows, "* * * if the defendants or any one of them or any two of them conspired to cast false votes for a federal candidate, the jury must find that the defendants conspired to injure citizens in the enjoyment of their civil rights." Defendants at this point reiterate their argument re "specific intent," which we have previously discussed and rejected. Obviously, one person cannot engage in a conspiracy and the words, "or any one of them," should have been omitted. Otherwise, in view of our discussion of the "specific intent" issue, we think the instruction was quite favorable to defendants. Defendants complain of a portion of the court's charge on the element of intent. After discussing that element, and particularly the manner in which it could be proven, in language not complained of, the court stated:

> "You cannot look into a person's mind and see what his intentions are or were, but a careful and intelligent consideration of the facts and circumstances shown by the evidence in any case enables us to infer with a reasonable degree of accuracy what another's intentions were in doing or not doing certain things."

It is the phrase, "with a reasonable degree of accuracy," of which complaint is made and which it is argued relieved the government of proving intent beyond a reasonable doubt. We think the phrase complained of was erroneous, at any rate its use was unfortunate and under some circumstances might be prejudicial. However, the jury was instructed time and again that every essential element of the charge must be proven beyond a reasonable doubt before conviction could be had. More than that, we have rejected the theory that the burden was upon the government to show that the defendants had a "specific intent" to oppress a citizen in the exercise of a constitutional right. The intent which the court was discussing in the instruction under consideration related to an intent on the part of defendants to cast and cause to be cast false and fictitious ballots. On that score, as we have indicated, the proof was of such a certain and convincing nature that a jury could not have found other than that the defendants had such an intent. When the instructions are considered as a whole, and particularly under the setting of the case as it pertains to the issue of intent, we have no reason to believe that the phrase complained of was prejudicial.

We have examined other criticism directed at the instructions, which we find without merit. In fact, a reading of the entire charge as given to the jury leads us to the belief that it was fair and as favorable to the defendants as they had a right to expect.

The indictment alleged, of course, that the defendants pursuant to the alleged conspiracy injured and oppressed citizens in the exercise of their constitutional rights. In support of this allegation the government introduced four witnesses who testified that they voted in

the election for the candidates of a certain party, including those for Federal offices. The government, however, failed to prove that such voters were citizens, which failure, so the defendants argue, constitutes a fatal defect in the proof. Each of such witnesses testified that he was born in the United States, voted in the Precinct in question on November 2, 1954, and that he had been a resident of said neighborhood for ten years or more. The government contends that this proof raises a strong presumption of citizenship and that no more is required. The cases support the government's position. *Baker* v. *Keck*, 13 F. Sup. 486; *Ex Parte Delaney*, 72 F. Sup. 312, 324; *United States* v. *O'Rourke*, 125 F. Sup. 769, and *Hoffman et al.* v. *United States*, 68 F. 2d 101, 103. In fact, the latter case involved a civil rights prosecution under a predecessor statute to what is now 241. There, as here, defendants asserted error because of a failure to prove citizenship. In denying the contention the court stated:

> "A person is presumed to be a citizen of the country in which he resides until the contrary is shown. [Citing cases.] Furthermore, a presumption of citizenship arises from the testimony of Sanchez that he voted in New Mexico and Colorado. [Citing case.]"

We hold the proof on this point was sufficient.

Defendants contend that the court erred in permitting the testimony of an expert witness offered by the government on the ground that there was no proper showing of qualification; also, that the court permitted the admission of certain evidence prejudicial to defendants. We have examined the facts upon which this criticism is based and are not impressed that any serious injury was done the defendants. In any event, the court had a discretion in its rulings on these matters and there is no basis for holding that its discretion was abused.

In our view, the record is free from prejudicial error; in fact, we think defendants were accorded a fair trial and that a different result could hardly have been expected.

The judgment is

AFFIRMED.

Salvatori and Steinberg Tendered Instruction 16

In order to convict under this indictment it is necessary for the jury to find that the defendant had in mind the specific purpose of depriving citizens of the United States who were legal and qualified voters of the Seventh precinct of the First Ward of Chicago, Illinois, of the free exercise and enjoyment of a right and privilege secured to them by the Constitution and laws of the United States, namely, the right of suffrage.

The proof, if any, of a general intent to do a wrong to such citizens and legal and qualified voters is not sufficient, but a specific intent to deprive them of a constitutional right as the object of the conspiracy, if any, is a burden the law casts on the prosecution. In considering whether the defendants had such specific intent, you may take into consideration all the circumstances of the evidence as it has been developed, the relationship of the defendants and such citizens, and the malice, if any, of the defendants toward such citizens.

Salvatori and Steinberg Tendered Instruction 17

Unless you find, beyond a reasonable doubt, that the defendants conspired, combined, confederated and agreed together with the specific and willful intent to injure and oppress a citizen of the United States in the exercise of a right guaranteed or secured by the Constitution or laws of the United States, and did so knowingly, it is your duty to acquit the defendants, or such defendant or defendants who did not knowingly, and with such specific and willful intent so conspire, combine, confederate and agree.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois

Thursday, January 3, 1957

Before
Hon. F. Ryan Duffy, Chief Judge
Hon. J. Earl Major, Circuit Judge
Hon. Walter C. Lindley, Circuit Judge

No. 11665	United States of America, Plaintiff-Appellee, vs. Louis William Nathan and Gaetano Alviti, Defendants-Appellants;	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 11666	United States of America, Plaintiff-Appellee, vs. Frank Cleo Tornabene, et al., Defendants-Appellants.	

Leave granted defendants to file supplemental petition for rehearing. Major, C.J., and Lindley, C.J., vote to deny petition for rehearing; Duffy, C.J., votes to allow petition for rehearing. Petition for rehearing denied.

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